

89-584

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

IN RE: JOHN R. MARIK,
Petitioner,

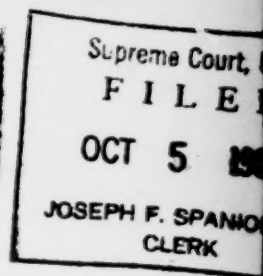
v.

RICHARD L. THORNBURGH,
UNITED STATES ATTORNEY GENERAL,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

1. Has John R. Marik been unduly restrained of his liberty?
2. Is the trademark and service mark "Seventh-day Adventist" invalid and void?

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Petitioner on information and belief
alleges:

1. JURISDICTION.

This Court has jurisdiction under 28
U.S.C., Sections 2241(a), 2241(c)(1), and
2241(c)(2), and 28 U.S.C., Section 1651(a).

2. THE PARTIES

Petitioner, John R. Marik, is pastor
of the Seventh-day Adventist Congregational
Church located on the island of Hawaii, in
the State of Hawaii, with his residence
address being P.O. Box 271, Kealahou,

Hawaii 96750.

Respondent, Richard L. Thronburgh, is Attorney General of the United States, with a business address: Justice Department, 10th Street and Constitution Avenue N.W., Washington, D.C.

3. CLAIM FOR RELIEF

3.1 On the island of Hawaii is the Seventh-day Adventist Congregational Church pastored by John R. Marik. On the rented building serving as its church is placarded a wooden board on which is painted the name Seventh-day Adventist Congregational Church to so designate the building, and to invite those who desire, to worship services. The peace of this small church was shattered in 1984 when they received a letter labeling them as an "off-shoot" from the General Conference of Seventh-day Adventists, and indicating that they were about to be sued for trademark infringement of the name "Seventh-day Adventist." They responded,

and have consistently maintained ever since that they had a right to use such name, and that they had no intention of abandoning its use. After several jabbing threats, the General Conference Corporation of Seventh-day Adventists filed suit against the Seventh-day Adventist Congregational Church and its pastor, John R. Marik, for trademark infringement of the name Seventh-day Adventist in the United States District Court of Hawaii on April 9, 1987, Civil Case No. 87-0274. The small church and its pastor did not have the financial resources to hire an attorney to defend them, so John Marik acted pro se on their behalf. This resulted in a Judgment on the pleadings being entered on behalf of the General Conference Corporation of Seventh-day Adventists, and against the small church and its pastor, on December 8, 1987, and enjoining them from the use of the name "Seventh-day Adventist." Finally, on May

12, 1988, an order was entered holding the defendants, this small church and its pastor, in contempt of the Judgment and Permanent Injunction, and assessing fines against each of them, individually and collectively, in the amount of \$500.00 per day, and ordering that a warrant be issued for the arrest of John R. Marik "until full compliance with the Judgment and Permanent Injunction by Defendants is obtained." Such warrant has issued.

3.2 The aforementioned case is now on appeal to the United States Ninth Circuit Court in San Francisco, California, Case No. 88-2506. A hearing in such case was held on May 11, 1989, in San Francisco, California. No decision has as yet been rendered in such case.

3.3 Though a warrant for arrest of John R. Marik has issued pursuant to the Court order, he has not been apprehended and subjected to confinement in jail.

Nevertheless, due to the Court Order a severe restraint has been placed on his individual liberty. He has been required to temporarily abandon his residence as an abode. He is no longer able to preach the Word of God openly, without thought of apprehension by federal authorities for so doing. His right to vote has become a nullity. He no longer has the freedom of movement accorded to the general citizenry.

3.4 In the Court proceedings John Marik and his church have consistently maintained that the trademark "Seventh-day Adventist" is invalid and that the Courts lack jurisdiction over the subject matter.

3.5 Though John R. Marik is not confined to jail, he is in the technical custody of the United States Attorney General, Richard L. Thronburgh, for such responsibility has been so delegated to him under the laws of the United States. For the purpose of this Petition only, John R.

Marik has relinquished his actual custody into the hands of his Attorney, Max A. Corbett, an officer of this Court, for the sole purpose of appearing before this Court, and not another, and upon the condition that if his personal appearance is desired by this Court, a stay shall be entered by the Court of the warrant for his arrest, sufficient to assure him safe conduct from and to his abode for such appearance without any molestation or restriction whatsoever. The heading above is amended to include Max A. Corbett as a Respondent solely for the purpose of assuring the appearance of John R. Marik before the Court as above specified, and is not amended in any manner so that there would be a conflict in interest in his representation of John R. Marik to the fullest extent allowed by law.

3.6 This petition is presented for the purpose of obtaining a writ of habeas

corpus and for final relief holding that the trademark "Seventh-day Adventist" is invalid, and ordering that it be cancelled and voided in the records of the United States Patent and Trademark Office, and granting Petitioner, John R. Marik, such other and further relief as the Court deems just and proper.

4. BASIS OF CLAIM FOR RELIEF

4.1 The trademark "Seventh-day Adventist" is void in regard to Petitioner and his church because it violates freedom of religion and speech as guaranteed by the Constitutions of the United States and the State of Hawaii, and because such name is a generic name. The fact that a warrant for the arrest of Petitioner John R. Marik has issued for violation of the Judgment and injunction raises the religious liberty issue. *Airport Com'rs of Los Angeles v. Jews for Jesus*, ___ U.S. ___, 96 L.Ed.2d 500, 107 S.Ct 2568 (1987); *Brockett v.*

Spokane Arcades, Inc., 472 U.S. 491, 86 L.Ed.2d 394, 105 S.Ct 2794 (1985). The use of the name "Seventh-day Adventist" is intricately interwoven with the religious beliefs of Petitioner and his church. "Seventh-day" indicates they keep the Sabbath of the fourth commandment, sunset on Friday to sunset on Saturday, as set forth in Exodus 20:8-11. "Advent" indicates their belief that the second coming of Jesus Christ is imminent. Such name is but a summary way of indicating other doctrines and beliefs closely inter-related with those stated. The General Conference of Seventh-day Adventists, parent organization of the General Conference Corporation of Seventh-day Adventists, likewise so believes. In regard to an independent congregational church holding to the "Advent" belief and which began in 1844 to keep the Sabbath of the fourth commandment, they have stated:

"They were the first Seventh-day Adventists." (Early Writings, by E.G. White, Prologue, p. xx). The present Seventh day Adventist Church wasn't organized until 1863. Seventh-day Adventist Encyclopedia, 1966 ed., p. 933.

The facts in the above referenced case are very similar to that of Christian Science Bd of Directors v. Evans et al, 105 N.J. 297, 520 A.2d 1347 (N.J. 1987). In the Christian Science case the religion had its origin in 1866. It became an organized religion in 1879. The defendants in that case disassociated themselves from the First Church of Christ, Scientist and formed their own church, using the name "Independent Christian Science Church of Plainfield, New Jersey." The First Church of Christ, Scientist obtained a trademark and service mark of the names "Christian Science" and "Church of Christ, Scientist" under the Lanham Trademark Act, 15 U.S.C.

Sec. 1051-1127, and brought suit to enjoin continued use of such names by defendants. The Court in that case, 520 A.2d 1347, 1352, 1353, held that "'Christian Science Churches' is a generic name for churches in which Christian Science is practiced.", and "the term 'Christian Science Church' is not entitled to trademark status." It further held, Ibid p. 1354, that "Because we have concluded that 'Christian Science Church' is generic and not descriptive, any secondary meaning shown by plaintiffs is no avail to them." Note the similarities of that case and the above referenced case: (1) both religions had their origin prior to their organization, (2) prior to the organization there were a number of such churches practicing such religion using a name which included that part thereof which was later trademarked and service marked, (3) the name of each was vitally associated with the religion, (4) plaintiff and

defendants in each case practiced the same religion, (5) a trademark and service mark registration was made in each under the Lanham Trademark Act, and (6) an injunction was sought in each to prohibit further use of the name trademarked and service marked. The Court in the Christian Science case, Ibid, p. 1351, appropriately held: ". . . the law has come to recognize: (1) because 'Christian Science' is the name of a religion, anyone practicing . . . 'Christian Science' can use that phrase in the name of a church; (2) because defendants practice the Christian Science religion (as plaintiffs readily acknowledge), they are entitled to use 'Christian Science' in the name of their church." Generic names are not subject to trademark. Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 83 L.Ed 73, 59 S.Ct 109 (1938). In that case "shredded wheat" was held to be generic. In Supreme Lodge Knights of Pythias v.

Improved Order Knights of Pythias, 113 Mich. 133, 136, 71 N.W. 470, 471 (1897) a fundamental proposition was noted: "Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church to adopt as a permanent part of its name the name of the parent organization." This principle was acknowledged in *Mc Daniel v. Mirza Ahmad Sohab*, 27 N.Y.S.2d 525 (Sup.Ct.), aff'd 262 A.D. 838, 290 N.Y.S.2d 509 (1941) where the Court held as page 527: "The plaintiffs have no right to a monopoly of the name of a religion. - The defendants, who purport to be members of the same religion, have an equal right to use the name of the religion in connection with their own meetings, lectures, classes and other activities. . . Defendants have the absolute right to practice Baha'ism, to conduct meetings,

collect funds and sell literature in connection therewith, and to conduct a book shop under the title 'Bahia Book Shop.'" A simialar approach has been adopted in other cases: *New Thought Church v. Chapin*, 159 A.D. 723, 144 N.Y.S. 1026 (1913); *Board of Provincial Elders of the Moravian Church v. Jones*, 273 N.C. 174, 159 S.E.2d 545 (1968); *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal.2d 121, 245 P.2d 481 (1952), cert den 345 U.S. 938, 97 L.Ed 1365, 73 S.Ct 828 (1953). Each of the above cases clearly indicate that the name is closely tied with the religion and entitled to appropriation by a group holding the same religion. It is thus a fundamental right and constitutent part of freedom of religion subject to protection under the First and Fourteenth Amendments of the U.S. Constitution. See *Charities, Churches - Name Protection*, 37 A.L.R.3d 277.

Petitioner and his church are entitled to use a sign to announce their religious services as a part of their freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution. *Girl Scouts of United States v. Personality Posters Mfg. Co.*, 304 F.Supp 1228 (SDNY, 1969). *Brown Chem. Co. v. Meyher*, 139 U.S. 540, 35 L.Ed. 247, 11 S.Ct 625 (1891); *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U.S. 118, 49 L.Ed 972, 25 S.Ct 609 (1905); *Thomas v. Board of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (C.A. 2, 1979), cert den 444 U.S. 1081, 62 L.Ed 765, 100 S.Ct 1034. Where property rights are juxtaposed with the right of freedom of speech, the later occupies the preferred position. *Marsh v. State of Alabama*, 326 U.S. 501, 90 L.Ed 265, 66 S.Ct 276 (1946).

In The Encyclopedia of American Religions, 2nd Ed., J. Gordon Melton,

1987, p. 432-435, there are listed four churches bearing the name "Seventh-day Adventist" or "S.D.A." in their titles, other than the Seventh-day Adventist Church, which is also listed. One of these churches, Seventh-day Adventist, Reform Movement, had its origin in 1914 as a result of their members being disfellowshipped from the Seventh-day Adventist Church for refusing to bear arms in violation of the commandment "Thou shalt not kill." As already noted, the name "Seventh-day Adventist" is intimately connected with these religious groups. Consequently, to allow one of them to the exclusion of the others to use the name "Seventh-day Adventist" based on laws of the United States would be to advance that religion, and inhibit the the others. This would be in violation of the Establishment Clause of the First Amendment of the United State Constitution which states: "Congress

shall make no law respecting an establishment of religion. ." Under the Fourteenth Amendment, this "fundamental Concept of liberty" is also applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L.Ed 1213, 60 S.Ct 900, 903 (1940).

The Court in *Edwards v. Aguillard*, ___ U.S. ___, 96 L.Ed.2d 510, 107 S.Ct 2573 (1987) applied a three-pronged test for determining whether there was compliance with the Establishment Clause: "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion." The Lanham Trademark Act as construed by the District Court in the aforementioned case, Case No. 87-0274, most definitely advances one religion, and inhibits other religions.

Thus, based on a non-compliance with the second prong of the three-pronged test, there has in fact been a violation of religious liberty, contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution. *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct 2105 (1971). The special context out of which this controversy arose must be given due consideration. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 92 L.Ed.2d 549, 106 S.Ct 3159 (1986). This was not given due consideration in the aforementioned case, Case No. 87-0274. This is of particular significance. One making a motion for summary judgment or judgment on the pleadings, as in that case, is required to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Adickes v. S.H. Kress and Company*, 398

U.S. 144, 26 L.Ed.2d 142, 90 S.Ct 1598 (1970).

"The cases identify four categories of terms with respect to trademark protection: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.

. . . A 'generic' term is one that refers, or has come to be understood as referring to the genus of which the particular product or service is a species. It cannot become a trademark under any circumstances." *Surgicenters of America v. Medical Dental Surgeries*, 601 F.2d 1011 (C.A. 9, 1979). In dealing with the term "Chocolate Fudge," the court in *A.J. Canfield Co. v. Honickman*, 808 F.2d 291 (C.A. 3, 1986) quoted the following from the Ninth Circuit *Surgicenters* case: "One who first conceives a left-handed moustache cup has no title to the product name even though, through lack of competitive interest or otherwise, he is the only source of that amenity." See

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"Generic Terms," Chap. 12, Trademarks and Unfair Competition, 2nd Ed, J. Thomas McCarthy. The Court in *Surgicenters of America v. Medical Dental Surgeries*, *ibid*, noted that "Surgicenter" was but a combination of two generic words, "surgical" and "center," and that such combination still remained a generic word. That Court cited the case of *Cummins Engine Company, Inc. v. Continental Motors Corp.*, 359 F.2d 892 (C.C.& P.A., 1966), which held that the combination of "turbine," in its combining form "turbo", and "diesel," resulted in a generic word, "turbodiesel."

The name "Seventh-day Adventists" is but a combination of two words, "Seventh-day" and "Adventists." A test to determine whether a name is generic was propounded in *United States Jaycees v. San Francisco Junior Chamber of Commerce*, 513 F.2d 1226 (C.A. 9, 1975), and noted in *Surgicenters of America, Inc. v. Medical Dental*

Surgeries, Co., *ibid.* That test is "Who are you - what are you." Since a mark answers the questions "Who are you? Where do you come from? Who vouches for you?", it by its nature cannot be generic. In contrast, if the name of a product answers the question "What are you?", such name is generic. *Bayer Co. v. United Drug Co.*, 272 F. 505 (DC NY, 1921). When the name "Seventh-day" is so viewed, it must be concluded that it is generic. The following is noted in *The Encyclopedia of American Religions*, J. Gordon Melton (1987), at p. 64:

"Seventh-Day or Saturday worship has been a recurring issue raised by serious students of the Bible. For the Baptists who were in search of ways to recover the primitive church, it was an early theme. Modern Sabbatarians find it practiced throughout Christian history, but its modern history begins in the 1550's with scattered reports of Sabbatarians among British reformers. As early as 1595, a book was published on the question by Nicholas Bownd."

Such Encyclopedia notes a number of Seventh-day Baptist church, see p. 404 et

seq., including the Seventh-day Baptist General Conference USA and Canada Ltd., organized in 1801, and Seventh-day Baptists (German) which was instituted in the United States in 1764.

The name "Adventist" must also be considered to be generic. Regarding those considered to be Adventists, this same Encyclopedia, comments at p. 77:

"Since the beginning of Christianity, various groups have arisen sporadically to preach a type of faith that has been called apocalyptic, chiliastic, or millennial. The movements have been characterized by the expectation of the immediate return of Christ to bring a final end to 'this evil order' and replace it with a new world of supreme happiness and goodness. At every turning point in the history of Christianity, people supporting such movements appeared, sometimes within the mainstream of church activities as disturbers of accepted patterns of life, and sometimes at the outer edge of church activities as critics and reformers. Always their presence is felt because they promote an idea which orthodox Christians have said to part of the faith."

This encyclopedia also lists a number of Adventist churches, p. 431 et seq, including the Advent Christian Church,

organized in 1855.

According to the case law above cited, it is inescapable that the name "Seventh-day Adventist" is generic. Petitioner's church name is not confusingly similar to that of General Conference Corporation of Seventh-day Adventists, nor is there a false, deceptive, or misleading designation, for it contains in bold manner the word "Congregational," which clearly distinguishes it from the name of such corporation.

Who can deny that one has the right to propagate a name which is generic as part of his freedom of speech?

4.2 General Conference Corporation of Seventh-day Adventists has asserted in its Complaint and other documents in the referenced case, Case No. 87-0274, that it is the owner of the tradename, trademark, and servicemark "Seventh-day Adventist." It admits that "The General Conference

Corporation of Seventh-day Adventists is a wholly owned, controlled and subordinate entity of the General Conference of Seventh day Adventists." (emphasis added) Last sentence of Page 3, Plaintiff-Appellee's Memorandum in Opposition to Defendants-Appellants' Motion for Sanctions, Case No. 88-2506, above cited. On or about November 1, 1988, the North American Division of Seventh-day Adventists adopted a new policy relating to trademarks, NAD B 80, a copy of which was attached to Defendant-Appellants' Motion for Court to Take Judicial Notice of Assignment of Trademark, Case No. 88-2506, above cited, and is also set forth in the Appendix hereof. In Section B 80 20 thereof it is provided: "It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that

should be taken to protect the proprietary interests of the Church as well as its good name. Approval of the General Conference Officers shall be obtained prior to the implementation of any legal action." The Trademark Committee is a committee of the General Conference of Seventh-day Adventists, not of General Conference Corporation of Seventh-day Adventists. Such corporation admits that subordinate entities of the General Conference of Seventh-day Adventists, including Hawaii Conference of Seventh-day Adventists and General Conference Corporation of Seventh-day Adventists are a "a 'related company' within the meaning of 15 U.S.C. 1127 and its use of the trademark/service mark 'Seventh-day Adventist.'" Sec. 5 of Affidavit attached to Plaintiff-Appellee's Memorandum in Opposition to Defendants-Appellants' Motion for Sanctions." Case No. 88-2506, cited above. In PTO Trademark

Manual of Examining Procedure, Sec. 1201.02(b) it is provided: "In a related company situation, the party who controls the nature and quality of the goods or services with which the mark is used and who is thereby the owner of the mark, should be set out in the application as the applicant." Here is a clear statement that the one who controls the nature and quality of the goods with which the mark is used, is the owner of the mark, regardless of who may hold legal title, and is the appropriate one to make application for the trademark and service mark. Considering the matters above specified, this makes the General Conference of Seventh-day Adventists and not Plaintiff-Appellee in the aforementioned Case No. 88-2506, General Conference Corporation of Seventh-day Adventists, the owner of any trademark and service mark of the name "Seventh-day Adventist." The comments of J. Thomas Mc

Carthy in Trademarks — and Unfair Competition, 2nd. Ed., 1984, Bancroft-Whitney Co., Sec. 18.16 at page 839 are appropriate: "The Lanham Act definition of 'related company' is awkwardly worded in that it contains the phrase 'any person who legitimately controls . . . the registrant'. This could be read to mean that licensees could control the licensor-registrant. But this would be an absurd reading, totally contrary to the whole rationale of licensing and the PTO does not so read the Act." This has been noted previously. Judge Nies, concurring in *In Re Wella A.G.*, 787 F.2d 1549 (Fed. Cir. 1986) states: "Regardless of their being related companies, only one is the owner. Whether the relationship is that of licensor/licensee or parent/subsidiary, the one entity which controls the nature and quality of the goods sold under the mark is the owner. See J. Mc Carthy, *supra*, Sec.

18.14, p. 830; Trademark Manual of Examining Procedure, Sec. 1201.01 et seq." In Case No. 88-2506 aforementioned, the Plaintiff-Appelle, General Conference Corporation of Seventh-day Adventists, admits that it is the General Conference of Seventh-day Adventists who controls the nature and quality of the goods sold under the mark, as already noted. Accordingly, the General Conference of Seventh-day Adventists is the owner of the trademark and service mark "Seventh-day Adventist." Under Section 1 of the Lanham Act, 15 U.S.C. 1051, it is only the owner of a mark who is entitled to apply for registration. In In Re Wella A.G., Ibid., it was stated in the concurring opinion of Judge Nies: "If one who is not the owner seeks registration, the application must be denied and any registration which issues is invalid. Smith v. Tobacco By-Products & Chemical Corp., 243 F.2d 188, 44 CC Pa 880, 113 USPQ

339 (1957); see also, In re Alexander, 114 USPQ 547, 548 (Comm'r Pats. 1957); J. Mc Carthy, Trademarks and Unfair Competition Sec. 16:14, 19:14 (2d ed. 1984); E. Vandenburg, Trademark Law and Procedure Sec. 10.11(b) (2d ed. 1968): 37 C.F.R. 2.33 (1985)." In a subsequent appeal of this case after remand, the opinion of Judge Nies was not disturbed. In re Wella, 858 F.2d 725 (Fed. Cir. 1988). Thus, by the General Conference Corporation of Seventh-day Adventists' own admissions, the trademark and service mark of the name "Seventh-day Adventist" is invalid. Accordingly, there is a lack of subject matter jurisdiction, and Petitioner's and his church's assertions in Case No. 88-2506 aforementioned that there was fraud perpetrated in the presentation of an application for such trademark and service mark by General Conference Corporation of Seventh-day Adventists are confirmed, for

there was a knowing misrepresentation made, with the deliberate intent to deceive, for on numerous occasions such party has asserted that it is owner of such trademark. This also confirms Petitioner's and his church's assertion that the General Conference of Seventh-day Adventists was an indispensable party to such action, Case No. 88-0274 aforementioned, and not being so, the judgment of such trial court must be reversed. This also evidences that General Conference Corporation of Seventh-day Adventists has come with "unclean hands," and that not only must such case be reversed, but it must also be dismissed.

4.3 If it is held by the Court that the name "Seventh-day Adventist" is a property right subject to protection by law, then Petitioner contends that he and the church which he pastors, and other churches so similarly situated, are

entitled to the name "Seventh-day Adventist" instead of the General Conference Corporation of Seventh-day Adventists or its parent organization, the General Conference of Seventh-day Adventists. This Court has held that where a majority faction has made a complete change in doctrinal position of the church so as to transform it into a different religious denomination, than a minority faction separating from the parent organization is entitled to property rights inuring out of such original organization. *Bouldin v. Alexander*, 15 Wall 131, 21 L.ed 69 (1872); *Christian Church v. Crystal*, 78 C.A. 1, 247 P. 605 (1926); *Wright v. Smith*, 4 Ill. A.2d 470, 124 N.E.2d 363 (1955); *Huber v. Thorn*, 189 Kan 631, 371 P.2d 143, reh den 190 Kan 125, 372 P.2d 579 (1962). See "Church Property - Minority Faction," 15 ALR3d 297. It should be noted that such rule is applicable to congregational

churches. But, as above noted, the first Seventh-day Adventist Churches were congregational. In the Seventh-day Adventist Church Manual, 1986 ed, at page 38 is set forth the type of organization to which it adheres: "Representative - the form of church government which recognizes that authority in the church rests in the church membership, with executive responsibility delegated to representative bodies and officers for the governing of the church. This form of church government recognizes also the equality of the ordination of the entire ministry. The representative form of church government is that which prevails in the Seventh-day Adventist Church." (emphasis added). Thus, as between a hierarchical structure and a congregational structure, usually recognized by the Courts, the Seventh-day Adventist Church is, by its own admission,

one whose structure more closely resembles that of congregationalism, and thus the rule noted should be applicable to them.

Many instances could be noted where the Seventh-day Adventist Church, and its subsidiary organizations, including the General Conference Corporation of Seventh-day Adventists, has departed from the principles of those of its founders. Only a few will be noted.

The founders of the Seventh-day Adventist Church staunchly advocated religious freedom, but the present organization, in spite of its professions, has evidenced by its own actions that it despises religious freedom. In 1863 the Seventh-day Adventist Church during the American Civil War formally opposed conscription due to the fact that governmental action would require individuals to violate the noncombatant principles held by the Seventh-day Adventists. During World

War I a serious doctrinal dispute developed within the world-wide Seventh-day Adventist Church over the Church's ambivalent stance concerning the right of individuals to refuse to bear arms in violation of the Fifth Commandment, "Thou shalt not kill." This came to a head when the Seventh-day Adventist Church in Germany agreed that conscription into the Kaiser's army was proper. Many holding to the former position were disfellowshipped, and as a result many died for refusing to bear arms against the United States and its allies. The Seventh-day Adventist Church has never openly acknowledged that were wrong in taking such an ambivalent stance.

The case out of which the warrant for arrest of John R. Marik arises is another instance of where religious freedom of expression has been ignored as above noted.

The founders of the Seventh-day Adventist Church were deeply respectful of

life, even of one's enemies, as noted above. But, such is not the case anymore. They have now taken a non-committal stance on the abortion issue. Insight, January 23, 1988 (SDA publication). But, the Bible clearly condemns abortion as murder. Ps. 139:14-16; Gen. 2:7; Lk. 1:26-56. Pioneer Seventh-day Adventists also condemned abortion as murder. In a in Seventh-day Adventist Church publication, Advent Review and Sabbath Herald, November 30, 1869, is an article entitled "A Few Words Concerning a Great Sin," in which it is stated:

"One of the most shocking, and yet one of the most prevalent sins of this generation is the murder of unborn infants. Let those who think this a small sin, read Ps CXXXIX, 16 [Psalms 139:16]. They will see that even the unborn child is written in God's book. And they may be assured that God will not pass unnoticed the murder of such children." (bracketed expression inserted).

Ellen G. White is considered to be a prophetess by the Seventh-day Adventist Church, and in one of her books it is manifest that she considers the fetus to be

an unborn child. In Ministry of Healing, Ellen G. White, first published in 1905, we find at page 373 the following: "Every drop of strong drink taken by her [the mother] to gratify appetite endangers the physical, mental, and moral health of her child and is a direct sin against her Creator. . . . Two lives are depending upon her, and her wishes should be tenderly regarded, her needs generously supplied." (bracketed expression inserted). Also, at page 397 in Ministry of Healing is the following: "Life is mysterious and sacred. It is the manifestation of God Himself, the source of all life."

In marked contrast to the pioneer Seventh-day Adventists, the Seventh-day Adventist Church has now taken a non-committal stance on abortion. This is lucidly revealed in the Insight magazine, January 23, 1988, above mentioned, for therein is an article "We Do Abortions

Here," and that is certainly the case for a number of Seventh-day Adventist Hospitals. It is noted that in the American Hospital Association Guide to the Health Care Field, 1986, it is reported that 12 of 56 Adventist Hospitals in the United States maintain an "abortion program." It is reported in the January/February 1989 newsletter of the Adventist Society of Abortion Education that a woman pediatrician actually witnessed a late-term abortion in an Adventist Hospital where the baby was born alive and crying. Then the baby was "put in a bucket, sealed and suffocated." That is cold blooded murder. This matter was reported to Mrs. Teresa Beem, President of the Adventist Society of Abortion Education, by Mr. Richard Fredericks, 8117 Chester St., Takoma Park, MD 20912, (301) 431 0559.

Mr. Neal C. Wilson, President of the Seventh-day Adventist Church, speaking for

the church, has stated that they "lean towards abortion rather than against it." This is certainly indicated by their attitude towards the Adventist Society of Abortion Education, which has been threatened with legal action for using the term "Adventist" in their title. It being so obvious that the term "Adventist" is generic, the real thrust of their threat is evidenced: to eliminate opposition within the Seventh-day Adventist Church of a pro-life stance. Such society being a religious organization, this is a clear violation of the Genocide Convention Implementation Act, 50A U.S.C. Section 1091 (a)(4).

Thus, it should be abundantly clear that Petitioner and his church, and others like situated, are entitled to use the name "Seventh-day Adventist" instead of the General Conference of Seventh-day Adventists and its subsidiary organizations,

like the General Conference Corporation of Seventh-day Adventists.

4.4 Fines have already been assessed in excess of \$250,000.00 against Petitioner and a warrant for his arrest has been outstanding for over a year and four months. If the case out of which such warrant arises, now pending in the United States Ninth Circuit Court of Appeals, Case No. 88 2506, continues on its long tortuous route with final decision by such court, various motions, and eventually Writ of Certiorari to this Court, another \$250,000.00 in fines could be imposed, and the warrant for arrest could be outstanding for as much as three years. It is abundantly manifest that such fines and restriction of liberty constitute "excessive fines" imposed, and "cruel and unusual punishments inflicted," contrary to the provisions of the Eighth Amendment of the Constitution of the United States. Congress has voiced its views

regarding "cruel and unusual punishments inflicted" for civil contempt jailings by passing a bill to protest against civil contempt child-custody jailings. President George Bush signed such bill on September 23, 1989. It sets a cap of 12 months on such civil contempt jailings. A protest against a violation of religious liberty has just as far reaching implications as does a protest against child molestation. Such was the protest of Dr. Elizabeth Morgan which prompted the passing of the aforementioned bill. Restrictions of liberty in this case exceed the 12 month cap set by such bill.

5. CUSTODY

Petitioner, John R. Marik, is "in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States;" 28 U.S.C. Section 2241(c)(2). In commenting

on the "in custody" requirement of 28 U.S.C. Section 2241, this Court has stated: "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." Hensley v. Municipal Court, San Jose Milpitas J.D., Cal., 411 U.S. 345, 36 L.Ed.2d 294, 93 S.Ct. 1571 (1973). As indicated by such case, it was not necessary that the person be in actual physical custody, technical custody only being required, for the petitioner in that case was released on his own recognizance pending execution of sentence, being subject to appear as ordered by a Court. In this case Petitioner is in the technical custody of the Attorney General of the United States. 28 U.S.C. Sec. 509. He is also under an obligation to appear before this Court as above noted and specified in Section 3.5 above. In Justices of Boston Municipal

Court v. Lyndon, 466 U.S. 294, 80 L.Ed.2d 311, 104 S.Ct 1805 (1984) the rule set forth in the Hensley case was followed. A detailed critique is set forth in "Custody Requirement - Habeas Corpus," 36 L.Ed.2d 1012.

Petitioner belongs to that group of persons which have often been classified as the "middle class." As such he does not qualify to have the fines or warrant for his arrest stayed pending appeal of his case as one proceeding in forma pauperis. Neither does he have the financial resources to post a bond for such purpose. In fact, he does not, nor does his church, have the financial resources to hire an attorney. That was the reason that he appeared pro se for himself and his church until judgment was rendered in his case in the District Court of Hawaii. The middle class of this nation are the ones who principally pay the taxes of various

governmental units of the nation. Are they now to be accorded the status of being the under-privileged class also?

6. EXCEPTIONAL CIRCUMSTANCES

In satisfaction of the requirements of Rule 27.3(a) of this Court, and 28 U.S.C. Sec. 2242, the Court's attention is directed to the fact that John R. Marik is not in actual physical custody so that a District Court or a Court of Civil Appeals can require that he be brought forward. Neither is he in such technical custody that he can be brought forward by either of such courts. He is in custody, however, and may be brought forward, but only on the specified terms and conditions set forth in Section 3.5 above, and then only for an appearance before this Court.

The Court's attention is especially directed to the exceptional circumstances set forth in Sections 3 and 4 above. Particular note should be made of Section

4.4. From the matters set forth in such Sections 3 and 4 it is also apparent that adequate relief cannot be had in any other form or from any other court. Accordingly, the requirements of Rule 27 and 28 U.S.C. Sec. 2242 are met.

The granting of the requested Writ of Habeas Corpus will greatly aid the Court's appellate jurisdiction for it will clarify the matter of what constitutes an unreasonable restraint of liberty in a civil contempt case, such issue having been brought to the forefront by the recent bill signed by President George Bush with regard to civil contempt child-custody jailings.

7. JUDICIAL NOTICE

The Court is requested in accordance with the provisions of Rule 201(d) of the Federal Rules of Evidence (hereafter "FRE") to take judicial notice of the adjudicative facts set forth herein, and particularly as they are set forth in the Bible, Encyclope-

dias, Law Review articles, and other books referenced herein as other authorities.

FRE 201(f) specifies: "Judicial notice may be taken at any stage of the proceeding." It has been held that the rule of judicial notice applies to appellate courts, and they will generally take judicial notice of any matter which the court below could have judicially noticed. *United States v. Pink*, 315 U.S. 203, 86 L.Ed 796, 69 S.Ct 552 (1942); *Massachusetts v. Westcott*, 431 U.S. 322, 52 L.Ed.2d 349, 97 S.Ct 1755 (1977); *United States v. Dolan*, 544 F.2d 1219 (C.A. 4, 1976). For purposes of judicial notice, reference may be made to encyclopedias, textbooks, dictionaries, or other publications of established authenticity. *Werk v. Parker*, 249 U.S. 130, 63 L.Ed 514, 39 S.Ct 197 (1919); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (C.A. D.C., 1978). The pleadings in this case must be read in the

light of the facts of which the Court takes judicial notice. *United States v. Lamont*, 236 F.2d 312 (C.A. 2, 1956). Judicial notice has been taken of economic and business matters in Federal courts. *Fox v. Kane-Miller Corp.*, 398 F.Supp 609 (D.C. Md, 1975). Judicial notice has been taken of religious matters. Particular attention is directed to the Trademark Policy set forth Appendix. The dietary requirements of orthodox Jews has been judicially noticed. *United States v. Kahane*, 396 F.Supp 687 (ED NY, 1975). Matters of religious history are matters deemed subject to judicial notice, whether general or relating to a particular denomination. *Smith v. Pedigo*, 145 Ind. 361, 393, 33 N.E. 777 (Ind. Sup.Ct., 1893); *Hilton v. Roylance*, 25 Utah 129, 69 P. 660 (Utah Sup. Ct., 1902). The general doctrines and rules of each religious sect, and the distinction in belief between any sects is

a proper subject of judicial notice. Hilton v. Roylance, Ibid, Smith v. Pedigo, Ibid. Expulsion practices of particular denominations have been judicially noticed. Brayshaw v. Ridout, 79 Md 454, 29 A. 515. See 20 A.L.R.2d 514, Sec. 28. Judicial notice has also been taken of the existence of many incorporated church societies. Alden v. St. Peter, 158 Ill 631, 42 N.E. 392 (Ill. Sup.Ct., 1895). A general discussion of the matter of judicial notice in Federal Courts is given in 12 Federal Procedure, Lawyer's Edition, Sec. 33.37-33.64. See also 29 Am.Jur.2d Evidence Sec. 14-78.

WHEREFORE, Petitioner respectfully requests:

(a) That under 28 U.S.C., Section 2243, this Court issue an order that the Respondent show cause why this Petition should not be granted and the Petitioner discharged.

(b) That this Court set out in the Order a return date of ten days.

(c) That this Court set the matter down for hearing within five days after the return.

(d) That this Court enter an order staying the warrant for the arrest of John R. Marik, pending the final determination of this Petition.

(e) That this Court issue an order staying Case No. 88-2506, United States Ninth Circuit Court of Appeals, pending the final determination of this Petition.

(f) That this Court issue an order holding that the trademark "Seventh-day Adventist" is invalid, and ordering that it be cancelled and voided in the records of the Patent and Trademark Office.

(g) That this Court hear and determine the matter and upon final hearing issue an Order staying the warrant for the arrest of John R. Marik, pending the final determi-

mination of Case No. 88-2506 now pending in the United States Ninth Circuit Court of Appeals.

(h) That this Court grant Petitioner such other and further relief as the Court deems just and proper.

DATED: Houston, Texas, October 4, 1989.

Max A. Corbett

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(713) 444 2840

Attorney for Petitioner

APPENDIX

GENERAL CONFERENCE OF SEVENTH-DAY
ADVENTISTS TRADEMARK - NEW POLICY

On or about November 1, 1988, the North American Division of Seventh-day Adventists meeting in Minneapolis, Minnesota, adopted a new policy, NAD B 80, General Conference of Seventh-day Adventists Trademark, which reads as follows:

B 80 GENERAL CONFERENCE OF SEVENTH-DAY
ADVENTISTS TRADEMARK

B 80 05 Statement of Philosophy -- The Seventh-day Adventist Church has a historical, evangelical, and proprietary interest in trademarks, service marks, and trade names (referred to collectively herein as "trademarks") developed by the Church and its related organizations. This policy shall apply to the General Conference of Seventh-day Adventists, the world divisions and departments of the General Conference of Seventh-day Adventists, and other services, organizations, and corporations listed as General Conference entities in the current Seventh-day Adventist Yearbook (referred to collectively herein as "General Conference"). This policy shall also apply to other Seventh-day Adventist entities or organizations utilizing trademarks owned or controlled by the General Conference. It shall be the policy of the General Conference to obtain maximum legal protection under applicable law in harmony with the following procedures and guidelines:

B 80 10 Ownership -- All legal rights in any trademark utilized by the General Conference, as defined, shall be vested in the General Conference Corporation with use by a related or subsidiary entity subject at all times to approval and review by the General Conference Corporation.

B 80 15 Registration and Fees -- Trademark registration shall be obtained through the General Conference Trademark Committee pursuant to an enabling action of the General Conference Corporation. Legal fees and other expenses incidental to maximizing trademark protection shall be paid in full by any department, subsidiary, or related organization of the General Conference initiating the process or utilizing the trademark with the understanding that ownership at all times shall be vested in the General Conference Corporation.

B 80 20 Unauthorized Use -- It shall be the responsibility of the Trademark Committee to monitor and review any unauthorized use of the trademark, including recommendations to the General Conference Corporation with respect to any legal or other action that should be taken to protect the proprietary interests of the Church as well as its good name. Approval by the General Conference Officers shall be obtained prior to the implementation of any legal action.

B 80 25 Other Trademarks -- Seventh-day Adventist entities other than the General Conference shall be entitled to maintain trademark ownership and registration for various marks in their own names so long as such application, ownership, and use does not conflict with existing trademarks, legal rights and/or policy of the General Conference. The General Conference Trade-

mark Committee shall provide assistance and direction to non-General Conference entities as necessary.

B 80 30 Limitation of Rights -- Nothing in this policy shall be construed or interpreted as limiting any of the legal rights of the General Conference Corporation with respect to its ownership and use of any and all of its trademarks.

B 80 35 Use of Existing Marks -- The use of any existing trademarks including, but not limited to, "Seventh-day Adventists," and/or "Adventist" or any derivative of such trademarks, including, but not limited to "SDA," are authorized as follows:

1. Church entities that have denominational status and are included in the current Seventh-day Adventist Yearbook shall have license to use these trademarks in their names and ministries unless specifically revoked by the General Conference Corporation. Such trademarks shall not be utilized in commercial endeavors.

2. Local churches and companies may use these trademarks in their names and ministries following approval of status by the local conference or mission. Such trademarks shall not be utilized in commercial endeavors.

3. Lay and professional groups may not utilize trademarks owned by the General Conference Corporation without its express written approval. Application for such use shall be made to the secretary of the Seventh-day Adventist Trademark Committee of the General Conference. Use of such trademarks by lay and professional groups must be solely for noncommercial purposes. Granting such license to use trademarks

owned by the General Conference Corporation shall be at the sole discretion of the General Conference based on the following conditions:

a. Recommendation by the local conference or mission that the lay or professional group requesting trademark usage be granted the license;

b. The activities of the lay or professional group shall be in harmony with the teachings and specifically supported by the Seventh-day Adventist Church;

c. The organization's board and membership shall consist of Seventh-day Adventists in good and regular standing;

d. The anticipated use of the trademark shall not be in conflict with previously granted license(s); and

e. The trademark shall be utilized solely in noncommercial functions.

B 80 40 Right to Revoke -- The General Conference Corporation shall maintain the right to revoke permission for the use of any trademarks by any denominational entity or lay group at any time, with or without cause.

VERIFICATION

State of Texas
County of Harris

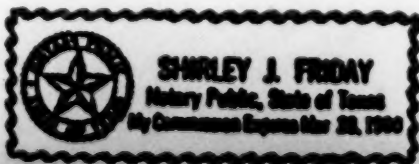
Personally appeared before me, the undersigned authority, on the date hereafter specified and in and for the jurisdiction aforesaid, Max A. Corbett, who acknowledged to me under oath that he is the attorney for John R. Marik, Petitioner in the foregoing Petition, and that he verifies the foregoing Petition for and on behalf of said John R. Marik; that he is duly authorized so to do; that the facts stated therein are on information and belief, and that the allegations therein are true and correct to the best of his knowledge and belief.

Date: October 4, 1989

Max A. Corbett

Max A. Corbett

Shirley J. Friday
Notary Public



(2)

Supreme Court, U.S.

FILED

OCT 24 1989

JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-584

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

IN RE: JOHN R. MARIK,
Petitioner.

EX-PARTE

MOTION FOR JUDICIAL NOTICE OF COURT OPINION

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QUESTION PRESENTED

Should specified Court Opinion be
judicially noticed?

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NO. 89-584

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

IN RE: JOHN R. MARIK,
Petitioner.

EX-PARTE

MOTION FOR JUDICIAL NOTICE OF COURT OPINION

Petitioner, John R. Marik, by and through his attorney, Max A. Corbett, moves the Court, pursuant to the provisions of Rule 201(d) of the Federal Rules of Evidence to take judicial notice of the Opinion of the United States Ninth Circuit Court of Appeals rendered on October 5, 1989, in the case of General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, Case No. 88-2506, copy attached and included in the Appendix hereto, as being supportive of the following specified matters:

1. In the Petition for Writ of Habeas Corpus submitted in this Case, one of the two questions presented for the Court's determination is: "Has John R. Marik been unduly restrained of his liberty?" The Court Opinion dated October 5, 1989, above referenced, clearly evidences that Judgment of the trial court from which appeal was made was improper, and therefore the Order of the trial court ordering the issuance of a warrant for the arrest of John R. Marik was invalid. Accordingly, the United States Court of Appeals has, effectively speaking, answered the question posed in the affirmative. Nevertheless, due to the fact that the Court of Appeals held that such Order was not before the Court, the warrant for the arrest of John R. Marik is still outstanding and he is subject to arrest.

2. Petitioner is still plagued with the problem noted on pages 41 and 42 of the

Petition for Writ of Habeas Corpus, namely in being among that group of persons known as "middle class." He doesn't qualify to have various orders and judgments stayed as one proceeding in forma pauperis, nor does he have the financial resources to provide security for a stay of and order or judgment, not even to proceed with a Writ of Certiorari to this Court, which he desires to make. The grossness of the injustice is multiplied in this case for case law clearly shows that the Court of Appeals should have held that the Order in question was properly before the Court of Appeals. A party may appeal a contempt issue as a part of an appeal from a final judgment. *Thomassen v. U.S.*, 835 F.2d 727 (C.A. 9th., 1987); *Union of Prof. Airmen v. Alaska Aeronautical*, 625 F.2d 881 (C.A. 9th., 1980). A civil contempt order is an interlocutory order, a part of the underlying civil action. *Ibid.*, p. 883.

An order to show cause is preliminary to contempt order, and therefore it is also interlocutory in character, and appealable as part of an appeal from judgment. A preliminary provisions¹ order is interlocutory. *Grant v. Phoenix Mutual L. Ins. Co.*, 106 U.S. 429, 27 L.Ed 237, 12 S.Ct. 414 (1882). Accordingly, there was a proper appeal from the Order in question.

3. The grossness of the injustice accorded Petitioner is even further multiplied by the holding of the Court of Appeals that the term "Seventh-day Adventist" could not be determined to be generic as a matter of law from the historical facts for which Petitioner in his appeal had requested the Court take judicial notice under Fed.R.Evid. 201. Such Historical facts, in summary, are as follows: (1) Registrant of trademark "Seventh-day Adventist" showed a first use in 1860, but one of the founders of the

General Conference of Seventh-day Adventists, parent organization of trademark registrant from whom it claims a derived first use, stated in her book Early Writings, E.G. White, at page xx of the prologue: "Into their midst came a Seventh Day Baptist, Rachel Oakes, who distributed tracts setting forth the binding claims of the fourth commandment. Some in 1844 saw and accepted this Bible truth. One of their number, William Farnsworth, in a Sunday morning service, stood to his feet and declared that he intended to keep God's Sabbath of the fourth commandment. A dozen others joined him, taking their stand firmly on all of God's commandments. They were the first Seventh-day Adventists." (emphasis added). (2) there are hundreds of Seventh-day Adventist Churches which are not part of nor associated with the parent organization of trademark registrant of "Seventh-day Adventist," or with trademark

registrant, including the Seventh-day Adventist Church, Reform Movement, which itself is comprised of several branches, which each in and of itself has numerous Seventh-day Adventist Churches. The admission of Ellen G. White, who is considered by the Seventh-day Adventist Church to be a prophetess, is an admission against interest to that of the trademark registrant. It should also be noted that the Seventh-day Adventist, Reform Movement had its origin in Germany in 1914 as a result of their members being disfellowshipped from the Seventh-day Adventist Church for refusing to bear arms against the United States and its allies and thus violate the commandment "Thou shalt not kill." Many other instances could be mentioned, but such should be sufficient to show that the name "Seventh-day Adventist" should be held to be generic based on historical facts requested to be judicially noticed, and

thus usable by any adhering to the basic principles of Seventh-day Adventism. This principle of genericness was recognized in the holding of the court in Christian Science Bd. of Directors v. Evans, 105 N.J. 297, 520 A.2d 1347 (1987), cited by the Court of Appeals in the Opinion attached hereto at page 12436. Fed.R.Evid. 201 has been invoked in this case.

THEREFORE, Petitioner John R. Marik respectfully requests that an order be issued whereby the Court takes judicial notice of the Opinion of the United States Ninth Circuit Court rendered below on October 5, 1989, in the case of General Conference Corporation of Seventh-day Adventists v. Seventh-day Adventist Congregational Church and John R. Marik, Case No. 88-2506. Also, it is requested that the Court stay without requiring security all further proceedings in either

the Court of Appeals or the District Court
pertaining to such case until a Writ of
Certiorari may be presented to this Court.

DATED: Houston, Texas, October 22, 1989.

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL CONFERENCE
CORPORATION OF SEVENTH-DAY
ADVENTISTS,

Plaintiff-Appellee,

v. _____

SEVENTH-DAY ADVENTIST
CONGREGATIONAL CHURCH; JOHN R.
MARIK,

Defendants-Appellants.

No. 88-2506

D.C. No.
CV-87-0274 RES
OPINION

Appeal from the United States District Court
for the District of Hawaii
Russell E. Smith, Senior District Judge, Presiding

Argued and Submitted
May 11, 1989—San Francisco, California

Filed October 5, 1989

Before: Procter Hug, Jr., Mary M. Schroeder and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

SUMMARY

Copyright, Patent and Trademark/Courts and Procedure

Reversing and remanding the district court's judgment, the
court held that a judgment on the pleadings is improper

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where a defendant either raises questions of material fact or presents affirmative defenses.

Defendants Seventh-Day Adventist Congregational Church and John Marik appealed a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. Plaintiff General Conference Corporation of Seventh-Day Adventists brought a claim against defendants under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response and a denial of plaintiff's allegations. Because defendants filed no response to plaintiff's motion for judgment on the pleadings, the district court ordered that it be granted. Defendants' motion to set aside the judgment was denied, and defendants appealed.

[1] A judgment on the pleadings is a decision on the merits and it is reviewed de novo. [2] Defendants filed two pleadings which the district court construed as "answers." If these "answers" are construed liberally because Marik submitted them pro se, they set forth two points that either raise questions of material fact or present affirmative defenses. [3] Defendants claimed that the name Seventh Day Adventist is generic because it refers to a religion rather than the church organization. Defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings. [4] Also in the answer, Marik made several factual assertions regarding the likelihood of confusion, and these factual allegations create a material issue of fact that should not have been determined in a judgment on the pleadings.

COUNSEL

Max A. Corbett and Peter N. Fowler, Annandale, Virginia,
for the defendants-appellants.

Lorraine H. Akiba, Honolulu, Hawaii, for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Defendants Seventh-Day Adventist Congregational Church and John Marik appeal a judgment on the pleadings and the issuance of a permanent injunction against them in a trademark infringement action. We reverse and remand for further proceedings.

BACKGROUND AND PROCEEDINGS BELOW

The General Conference Corporation of Seventh-Day Adventists sued the Seventh-Day Adventist Congregational Church, located in Kealahou, Hawaii, and its pastor, John R. Marik, under the Lanham Act, 15 U.S.C. § 1051 et seq., for trademark and service mark infringement, unfair competition, and false designation of origin. The General Conference also asserted claims under the common and statutory law of Hawaii relating to trademarks, service marks, trade names, unfair competition, deceptive trade practices, and false advertising. The complaint was filed on April 9, 1987. Marik, pro se, and allegedly on behalf of the Congregational Church, filed a response on May 18, 1987. The General Conference thought the response, which was in letter form, did not comply with the rules, and notified the defendants that it would give them an extension, until June 15, 1987, to file an amended answer. No amended answer was filed by that deadline.

On July 15, 1987, the General Conference filed a motion for judgment on the pleadings, or in the alternative, a motion to strike the answer of Marik and the Congregational Church.

A hearing on the motion was scheduled for September 8, 1987. On August 4, 1987, the defendants filed a "Denial of Plaintiff's Allegations." Pursuant to local rule, a scheduling conference was held August 10, 1987, before a magistrate. The magistrate advised Marik that the Congregational Church was an eleemosynary corporation and could not be represented pro se, and advised the Congregational Church to obtain legal counsel. The court continued the conference for that purpose.

The defendants filed no response to the motion for judgment on the pleadings. Because it received no opposition to the motion, the court ordered that judgment on the pleadings be granted, and denied the motion to strike. The judgment and a permanent injunction were entered December 8, 1987. The injunction prohibits the defendants from using a name that includes the term "Seventh Day Adventist" or "SDA," or promoting or representing to others that it is connected in any way with the General Conference. It also required the defendants to file a compliance report with the court within 30 days.

On December 28, 1987, the defendants, now represented by counsel, filed a motion for suspension of the injunction, a motion to set aside the judgment, and other related motions. On January 12, 1988, Marik and the Congregational Church filed a compliance report that stated that they refused to comply with the injunction because they believed the judgment was void for lack of subject matter jurisdiction, and because plaintiff's trademark was invalid. The General Conference responded with a motion to show cause why the defendants should not be held in contempt.

The district court denied defendants' motion to set aside the judgment, stating that the question whether "Seventh-Day Adventist" was a generic mark was one of law that had been decided in the judgment on the pleadings, and there was no reason to revisit the question upon a motion for new trial.

The defendants filed a notice of appeal on April 7, 1988. The district court then entered an order to show cause why defendants should not be held in contempt, and set a hearing for May 9, 1988. The district court held both Marik and the Congregational Church in contempt, set a fine of \$500 per day until compliance against both defendants, individually and collectively, and ordered that a warrant issue for Marik's arrest until full compliance with the injunction. The court also awarded plaintiff \$13,929.21 for attorneys' fees and costs incurred in pursuing the contempt order.

DISCUSSION

[1] A judgment on the pleadings is a decision on the merits, and we review it *de novo*. See *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 12(c). All allegations of fact by the party opposing the motion are accepted as true, and are construed in the light most favorable to that party. *McGlinchy*, 845 F.2d at 810. As a result, a plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings. See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 (1969).

[2] The defendants filed two pleadings—that the district court construed as “Answers.” If we construe these “answers” liberally because Marik had submitted them *pro se*,¹ see *United States v. Ten Thousand Dollars (\$10,000) in U.S. Currency*, 860 F.2d 1511, 1513 (9th Cir. 1988), they set forth two

¹Marik purported to answer for his church, an eleemosynary corporation. Not being an attorney, he could not answer for the church. The district court did not strike the answer, however. The church was represented by counsel by the time of its motion for new trial.

points that either raise questions of material fact, or present affirmative defenses. In the same permissive mode, the second "answer" filed after the motion for judgment on the pleadings, may be construed as an opposition to the motion. For these reasons, judgment on the pleadings was improper.

A. *Is "Seventh Day Adventist" a Generic Term?*

A trademark, even if it has become incontestable, is subject to the defense that the mark is generic. *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194-95 (1985). A trademark's function is to identify and distinguish the goods or services of one seller from another. 1. J. McCarthy, *Trademarks and Unfair Competition* § 12:1 (2d ed. 1984). A generic mark is one that tells the buyer what the product is, rather than from where, or whom, it came. *Id.* A generic mark cannot be subject to trademark protection because it does not indicate the product or service's origin, but is the term for the product or service itself. *Id.*

[3] The defendants claim that the name "Seventh Day Adventist" is generic: it refers to a religion, rather than the church organization. See *Christian Science Bd. of Directors v. Evans*, 105 N.J. 297, 520 A.2d 1347 (1987). Marik discussed the generic nature of the church name in his "Answers." Construing the "Answers" liberally, we find that Marik sufficiently raised the issue as an affirmative defense when he stated:

The phrase "Seventh-day Adventist" is not theirs alone, as they would like to claim, for it describes a system or set of Bible based christian beliefs, doctrines [sic], and standards. One, therefore, is not necessarily a Seventh-day Adventist because of what organization he may be affiliated with, but rather, he is a Seventh-day Adventist because of what he believes. Seventh-day Adventism is a particular faith, and those that conscientiously hold to that

faith are Seventh-day Adventists. For an example, there are many different "Baptist" churches, but they all have a very similar faith.

Even assuming everything the General Conference alleges is true, the defendants are not liable for trademark infringement if they prove that the mark is generic. Because this defense was raised in the answer, it bars a judgment on the pleadings.

B. *Likelihood of Confusion*

To establish trademark infringement, the plaintiff must prove that there is a likelihood of confusion from the defendant's use of a mark similar to plaintiff's. *See* 15 U.S.C. § 1114; *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1178 (9th Cir. 1988). Several factors are involved in determining likelihood of confusion, which is a question of fact. *See id.* at 1178-79; *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1355 (9th Cir. 1985) (*en banc*). These factors include: 1) the strength of the plaintiff's mark/name; 2) the proximity of the parties' goods; 3) similarity of the marks/names; 4) evidence of actual confusion; 5) marketing channels used; 6) likely degree of purchaser care; 7) defendant's intent in selecting the mark/name; and 8) likelihood of expansion of product lines. *Accuride Int'l, Inc. v. Accuride Corp.*, 871 F.2d 1531, 1533-34 (9th Cir. 1989).

[4] In the "Answers," Marik makes several factual assertions regarding the likelihood of confusion. First, he notes that the Congregational Church has "never in any way sought to deceive or confuse any one in regards to our name." He also states that the word "congregational" in the name of his church is explanatory, and distinguishes the two different churches. He states that "people have been quick to recognize this," and that the church intentionally used the word "congregational" to clarify that they were not affiliated with the plaintiff. All of these factual allegations go to the issue of likelihood of confusion, and create a question of material fact

that should not have been determined in a judgment on the pleadings.

C. Other Matters

Defendants attempt to challenge the order of the district court holding them in contempt. That order was entered, however, after the notice of appeal was filed. The order appealed from was not stayed. The notice of appeal stated that the appeal was from the judgment and injunction entered on December 8, 1987, and from the order denying new trial entered on March 16, 1988. It does not bring before us the later contempt order, and we decline to rule upon it. Further relief, if any, must come from the district court.

Because the contempt order is not before us, we deny the motion to supplement the record on appeal with the record of the contempt proceedings. We also deny, as not in compliance with Fed. R. Evid. 201, defendants' motion to take judicial notice of certain "adjudicative facts."

Remaining points urged by the defendants are without merit.

CONCLUSION

The judgment on the pleadings in favor of plaintiff is **REVERSED**, and the cause is **REMANDED** to the district court for further proceedings.

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